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**UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO DIVISION**

SHEET METAL WORKERS' NATIONAL
 PENSION FUND and INTERNATIONAL
 BROTHERHOOD OF TEAMSTERS LOCAL
 NO. 710 PENSION FUND, individually and as
 Lead Plaintiffs on behalf of all others similarly
 situated, and

INTERNATIONAL UNION OF OPERATING
 ENGINEERS PENSION FUND OF EASTERN
 PENNSYLVANIA AND DELAWARE,
 individually and as Named Plaintiff, on behalf of
 all others similarly situated,

Plaintiffs,

v.

BAYER AKTIENGESELLSCHAFT, WERNER
 BAUMANN, WERNER WENNING, LIAM
 CONDON, JOHANNES DIETSCH, and
 WOLFGANG NICKL,

Defendants.

Case No.: 3:20-cv-04737-RS

**DEFENDANTS' OBJECTION
 TO NEW EVIDENCE
 ACCOMPANYING PLAINTIFFS'
 REPLY MEMORANDUM IN
 SUPPORT OF MOTION FOR CLASS
 CERTIFICATION**

CLASS ACTION

Date: April 13, 2023
 Time: 1:30 p.m.
 Judge: Richard Seeborg
 Courtroom: 3 — 17th Floor

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TABLE OF CONTENTS

INTRODUCTION1

PROCEDURAL BACKGROUND1

DISCUSSION.....2

CONCLUSION.....3

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Dutta v. State Farm Mut. Auto. Ins. Co.</i> , 895 F.3d 1166 (9th Cir. 2018)	3
<i>In re Flash Memory Antitrust Litig.</i> , 2010 WL 2332081 (N.D. Cal. June 9, 2010)	2
<i>Gearing v. City of Half Moon Bay</i> , 2021 WL 4148663 (N.D. Cal. Sept. 13, 2021)	3
<i>Provenz v. Miller</i> , 102 F.3d 1478 (9th Cir. 1996)	3
<i>Wheeler v. Estee Lauder Cos.</i> , 2013 WL 12121543 (C.D. Cal. Feb. 12, 2013)	2
<i>Zamani v. Carnes</i> , 491 F.3d 990 (9th Cir. 2007)	2
 <u>Rules</u>	
Local Rule 7-3(d)(1)	1

INTRODUCTION

In moving to certify a class for this Section 10(b) action, Plaintiffs made a strategic decision to present limited evidence and virtually no briefing on the topic of extraterritoriality. While their pleadings allege fraud arising out of 21 purchases of Bayer securities, Plaintiffs submitted an expert report analyzing just 7 of those trades — coupled with an unsupported opinion that the remaining 14 were likewise executed in the United States. *See* Dkt. No. 141-2 (“Mitts Report”). Now, nearly five months later and just weeks before the Court is scheduled to hear argument on their motion, Plaintiffs have finally provided the rest of their expert’s analysis: A 47-page “reply” report that addresses the previously omitted trades by applying a newly minted methodology to never-before-considered documents. *See* Dkt. No. 164-1 (“Mitts Reply”).

Plaintiffs’ belated submission of affirmative evidence is improper and prejudicial. Accordingly, pursuant to Local Rule 7-3(d)(1), Defendants object and respectfully request that the Court disregard all portions of the Mitts Reply that are based on new affirmative evidence and arguments.¹ Alternatively, to the extent the Court is inclined to consider this new evidence, Defendants respectfully request that the Court grant their forthcoming motion for leave to file sur-reply papers in response.

PROCEDURAL BACKGROUND

On October 28, 2022, Plaintiffs moved to certify a class of investors who purchased Bayer American Depositary Receipts (ADRs). In support of that motion, Plaintiffs submitted an expert report on extraterritoriality, prepared by Prof. Joshua Mitts, Ph.D. *See generally* Mitts Report. Four pages of the report addressed whether Plaintiffs’ alleged trades were conducted in the United States, with only seven transactions discussed. *See id.* ¶¶ 41-50. Plaintiffs briefed the issue in a footnote that did not cite this Circuit’s governing standard. Dkt. No. 140 at 11 n.3.

Defendants opposed class certification and submitted a rebuttal expert report from ADR trading expert Cristian Zarcu. Dkt. No. 151-29. Mr. Zarcu provided detailed analysis of each of

¹ Defendants specifically object to Paragraphs 8, 15, 30, 32 (lines 9 through 14), 33 (lines 7 through 10), 34-35, 45-47, 48 (lines 10 through 13), 62, 64-69, 71-73, 75-83, 85-88, 90-96, 98-103, 105-08, 110-14, and 116-20 of the Mitts Reply.

1 Plaintiffs’ alleged ADR purchases and concluded based on his industry experience and review of
2 contemporaneous records that liability was incurred overseas for 18 of the trades. *Id.*

3 On March 21, 2023, Plaintiffs filed a reply brief in support of class certification, featuring 9
4 pages of new argument on extraterritoriality. Dkt. No. 163. Accompanying that reply brief was a
5 47-page, 124-paragraph “Rebuttal Expert Report” from Prof. Mitts, likewise presenting new
6 argument and analysis. *See generally* Mitts Reply. Defendants now lodge their objections to this
7 new evidence.

8 DISCUSSION

9 In seeking class certification, Plaintiffs bore the burden of affirmatively demonstrating that
10 the proposed class meets the requirements of Federal Rule of Civil Procedure 23. *Wal-Mart*
11 *Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Plaintiffs were obliged to carry this burden in
12 their opening submissions. *See, e.g., In re Flash Memory Antitrust Litig.*, 2010 WL 2332081, at
13 *15 (N.D. Cal. June 9, 2010) (sufficient evidence must be advanced in “moving papers in order to
14 afford Defendants a full and fair opportunity to respond”); *Wheeler v. Estee Lauder Cos.*, 2013
15 WL 12121543, at *3 (C.D. Cal. Feb. 12, 2013) (denying class certification where plaintiffs
16 attempted to “cure th[e] defect” in their motion “by submitting . . . evidence in their Reply”); *see*
17 *also Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007) (“The district court need not consider
18 arguments raised for the first time in a reply brief.”).

19 Prof. Mitts’ opening report asserted that “irrevocable liability for purchases by the
20 Plaintiffs was incurred in the United States, and as such, the Plaintiffs’ purchases were typical of
21 Class Members.” Mitts Report ¶ 41. However, Prof. Mitts provided supporting analysis for only
22 seven of these alleged purchases. *Id.* ¶¶ 42-48. The Mitts Report thus lacked any affirmative
23 discussion of Plaintiffs’ other transactions, including all trades alleged by one of the Lead
24 Plaintiffs, Sheet Metal Workers’ National Pension Fund.

25 The missing evidence did not come until the Mitts Reply, where Prof. Mitts belatedly
26 addressed the omitted trades. Across pages and pages of dense discussion, Prof. Mitts finally set
27 out his explanation of the documentary record, addressing new documents under a new
28 “methodology” that was nowhere described in his opening report. Mitts Reply ¶ 30. Along the

1 way, Prof. Mitts also disclosed, for the first time, that his conclusions turned on an interpretation
 2 of customer agreements between Plaintiffs’ investment managers and their broker dealers —
 3 contracts that he had never before identified as a basis for his opinions. *Compare, e.g.*, Mitts
 4 Reply ¶¶ 64, 71, 88, 105 (discussing and interpreting broker-customer agreements), *with* Mitts
 5 Report, App’x B (failing to disclose broker-customer agreements as “[d]ocuments [c]onsidered”).

6 By holding back Prof. Mitts’ analysis and reliance materials, Plaintiffs deprived
 7 Defendants of the opportunity to substantively respond. To avoid prejudice, the Court may
 8 properly decline to entertain such evidence. *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir.
 9 1996) (“[W]here new evidence is presented in a reply to a motion for summary judgment, the
 10 district court should not consider the new evidence without giving the [non-]movant an
 11 opportunity to respond”); *Gearing v. City of Half Moon Bay*, 2021 WL 4148663, at *10 (N.D. Cal.
 12 Sept. 13, 2021), *aff’d*, 54 F.4th 1144 (9th Cir. 2022) (declining to rely upon reply evidence subject
 13 to an objection asserting that it addressed “matters which should have been foreseen and addressed
 14 in connection with [the] original filing”). Defendants respectfully submit that the Court should
 15 disregard the new affirmative evidence included in the Mitts Reply.

16 In the alternative, if the Court is inclined to consider Plaintiffs’ new evidence, Defendants
 17 respectfully request an opportunity to address Prof. Mitts’ new-on-reply opinions and Plaintiffs’
 18 related arguments. *See Dutta v. State Farm Mut. Auto. Ins. Co.*, 895 F.3d 1166, 1172 (9th Cir.
 19 2018) (“Mitigation of any unfairness, following objection, may take the form of granting the
 20 objecting party leave to file a sur-reply opposition to the new matter.”). To facilitate the Court’s
 21 consideration of this alternative remedy, Defendants intend to submit an administrative motion by
 22 April 3, 2023 seeking leave to file sur-reply papers, accompanied by a proposed sur-reply report
 23 under preparation by Mr. Zarcu.

24 CONCLUSION

25 For the foregoing reasons, Defendants respectfully request that the Court disregard the new
 26 evidence and analysis contained in the Mitts Reply or, in the alternative, grant Defendants’
 27 forthcoming motion for leave to respond through sur-reply.
 28

1 Dated: March 28, 2023

2 By: /s/ Jordan Eth

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